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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 ILDER O. PIMENTAL,

12 Petitioner,

13 v.

14 V.M. ALMAGER, Warden,

15 Respondent.  
16  
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NO. CV 08-3992-GW (AGR)

ORDER TO SHOW CAUSE

18 On June 18, 2008, Petitioner filed a Petition for Writ of Habeas Corpus by a  
19 Person in State Custody pursuant to 28 U.S.C. § 2254. For the reasons  
20 discussed below, it appears that the one-year statute of limitations has expired.

21 The Court, therefore, orders Petitioner to show cause, on or before **August**  
22 **14, 2008**, why this Court should not recommend dismissal with prejudice based  
23 on expiration of the one-year statute of limitations.

24 I.

25 **PROCEDURAL BACKGROUND**

26 Petitioner was convicted on November 5, 2001, of two counts of robbery  
27 and kidnapping, and possession of a firearm and ammunition by a felon. (Petition  
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1 at 2.) He was also found to be armed with a handgun in both robbery/kidnapping  
2 counts. (*Id.*)

3 His sentence, partly based on one prior strike, was 48 years, 4 months in  
4 prison. (*Id.*) The California Court of Appeal affirmed the conviction on  
5 September 25, 2002. (*Id.* at 2-3.) The California Supreme Court denied review  
6 on December 11, 2002. (*Id.* at 3.)

7 According to the California Supreme Court's online docket, Petitioner filed  
8 a state habeas petition in that court on March 12, 2004, which was denied on  
9 January 19, 2005. (*Id.* at 4.) He filed a state habeas petition in the Los Angeles  
10 Superior Court on May 5, 2005, which was denied on the same day. (*Id.*) He  
11 filed a second state habeas petition in the Los Angeles Superior Court on March  
12 2, 2007, which was denied on the same day. (*Id.* at 4-5; Ex. A.) He filed a state  
13 habeas petition in the Court of Appeal on September 6, 2007, which was denied  
14 on September 12, 2007. (*Id.*, Ex. A.) He filed a second state habeas petition in  
15 the California Supreme Court on December 6, 2007, which was denied on May  
16 14, 2008. (*Id.*)

17 Petitioner raised the following four grounds in the instant petition: (1)  
18 insufficient evidence; (2-3) instructional error; and (4) Sixth Amendment violation  
19 in the imposition of the upper sentence term. (Petition at 5-6.)

## 20 II.

### 21 STATUTE OF LIMITATIONS

22 The petition was filed after enactment of the Antiterrorism and Effective  
23 Death Penalty Act of 1996 ("AEDPA"). Therefore, the Court applies the AEDPA  
24 in reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059,  
25 138 L. Ed. 2d 481 (1997).

26 The AEDPA contains a one-year statute of limitations for a petition for writ  
27 of habeas corpus filed in federal court by a person in custody pursuant to a  
28 judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts

1 running on the latest of either the date when a conviction becomes final under 28  
2 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D).

3 **A. The Date on Which Conviction Became Final**

4 On direct review, the California Supreme Court denied review on  
5 December 11, 2002. (Petition at 3.) Therefore, Petitioner's conviction became  
6 final 90 days later on March 11, 2003. *Bowen v. Roe*, 188 F.3d 1157, 1158-59  
7 (9th Cir. 1999). Pursuant to 28 U.S.C. § 2244(d)(1)(A), absent tolling, the statute  
8 of limitations expired on March 11, 2004.

9 Thus, the Petition is time-barred unless the statute of limitations was tolled.  
10 The statute of limitations is tolled during the time "a properly filed application for  
11 State post-conviction or other collateral review with respect to the pertinent  
12 judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Petitioner's first state  
13 habeas petition was not filed until March 12, 2004 (Cal. Sup. Ct. Docket), one day  
14 after the statute of limitations expired. A state habeas petition filed after the  
15 limitations period has expired does not toll or revive the expired limitations period.  
16 *Welch v. Carey*, 350 F.3d 1079, 1081-84 (9th Cir. 2003), *cert. denied*, 541 U.S.  
17 1078 (2004).

18 Petitioner does not disclose the date on which he mailed his state habeas  
19 petition to the California Supreme Court. However, assuming Petitioner signed  
20 and mailed his petition to the California Supreme Court before March 12, 2004,  
21 he would be entitled to take advantage of the mailbox rule, which would mean  
22 that his state habeas petition was constructively filed before the expiration of the  
23 statute of limitations. In that scenario, he would be entitled to statutory tolling. At  
24 the same time, though, the period of time from the finality of his conviction to the  
25 date of the mailing of his state habeas petition, most likely in March of 2004,  
26 would not be tolled because no case was "pending" during that interval. See  
27 *Thorson v. Palmer*, 479 F.3d 643, 646 (9th Cir. 2007). Thus, almost all of the one  
28 year would have been used up.

1 Even assuming Petitioner is then entitled to statutory tolling from about  
2 March of 2004 until May 5, 2005, when the Superior Court denied his first state  
3 habeas petition (Petition at 4), the gap between the denial of that petition and  
4 Petitioner's next filing on March 2, 2007, is almost two years. A petitioner is  
5 normally entitled to "one full round" of collateral review in the state court free of  
6 federal interference. *Carey v. Saffold*, 536 U.S. 214, 222, 122 S. Ct. 2134, 153 L.  
7 Ed. 2d 260 (2002). The Ninth Circuit interpreted "one full round" in California to  
8 mean consecutive petitions in the Superior Court, Court of Appeal, and California  
9 Supreme Court. See *Welch*, 350 at 1083 (internal quotation marks omitted).  
10 Petitioner's first round was unconventional. He filed first in the highest court and  
11 then filed in the lowest court. Nonetheless, he did nothing further until 2007.  
12 Clearly, the state habeas petitions begun in March of 2007 were based on the  
13 United States Supreme Court's decision in *Cunningham*, which was filed on  
14 January 22, 2007. (Petition at 4-5); *Cunningham v. California*, 549 U.S. 270, 127  
15 S. Ct. 856, 166 L. Ed. 2d 856 (2007). Thus, Petitioner's second round of state  
16 habeas petitions had nothing to do with his first, which were based on a claim of  
17 "illegal enhancement." (*Id.* at 4.)

18 *Evans v. Chavis*, 546 U.S. 189, 193, 126 S. Ct. 846, 163 L. Ed. 2d 684  
19 (2006) held that "[a]s long as the prisoner filed a petition for appellate review  
20 within a 'reasonable time,' he could count as 'pending' (and add to the 1-year  
21 time limit) the days between (1) the time the lower state court reached an adverse  
22 decision, and (2) the day he filed a petition in the higher state court." (citation  
23 omitted). *Evans* held that a six-month delay was not reasonable. *Id.* at 201.

24 Here, the gap was almost two years. Based on *Evans*, such a gap is  
25 unreasonable. See also *Gaston v. Palmer*, 447 F.3d 1165, 1167 (9th Cir. 2006)  
26 (gaps of 15 months, 18 months and 10 months between rounds of state habeas  
27 petitions are unreasonable), *cert. denied*, 127 S. Ct. 979 (2007). Therefore,

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Petitioner's petitions in 2007 were not "pending" and did not toll the limitations period.

Accordingly, absent equitable tolling, the statute of limitations expired shortly after May 5, 2005, and the petition here is time-barred. The petition does not provide a basis for equitable tolling.

#### **B. The Cunningham Decision**

Based on *Cunningham*, Petitioner may contend that Ground Four of the petition is not time-barred because of 28 U.S.C. § 2244(d)(1)(C), which states that the statute of limitations starts to run on "the date on which the constitutional right asserted was initially recognized by the Supreme Court [in *Cunningham*], if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." See *Dodd v. United States*, 545 U.S. 353, 357, 359, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005). In *Dodd*, the Supreme Court addressed a provision in 28 U.S.C. § 2255<sup>1</sup> that is materially identical to 28 U.S.C. § 2244(d)(1)(C):

The limitation period shall run from the latest of -

\* \* \*

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

The court held that the statute starts running on the date the court recognizes the right, not on the date the court makes it retroactively applicable. *Id.* at 358.<sup>2</sup> However, a petitioner "may take advantage of the date in the first

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<sup>1</sup> Under section 2255, a federal prisoner may challenge his or her sentence as unconstitutional.

<sup>2</sup> "*Dodd* is equally applicable to section 2244(d)(1)(C)." *Johnson v. Robert*, 431 F.3d 992, 992-93 (7th Cir. 2005) (per curiam).

1 clause of ¶ 6(3) only if the conditions in the second clause are met.” *Dodd*, 545  
 2 U.S. at 359.

3 Applying *Dodd* to the instant petition, the Supreme Court decided  
 4 *Cunningham* on January 22, 2007. For a petition based on *Cunningham* to be  
 5 timely under 28 U.S.C. § 2244(d)(1)(C), (1) it would have to be filed no later than  
 6 January 22, 2008; (2) the Supreme Court would have to recognize *Cunningham*  
 7 as a new rule no later than January 22, 2008; and (3) the Supreme Court would  
 8 have to declare *Cunningham* retroactive no later than January 22, 2008. See  
 9 *Dodd*, 545 U.S. at 359 (applicant “will be time barred except in the rare case in  
 10 which this Court announces a new rule of constitutional law and makes it  
 11 retroactive within one year”); *Johnson*, 431 F.3d at 992 (statute runs from date  
 12 that the right was initially recognized, “even if the Court does not declare that right  
 13 to be retroactive until later”). The Supreme Court has not recognized  
 14 *Cunningham* as a new rule.<sup>3</sup> Therefore, the petition is time-barred. See *Dodd*,  
 15 545 U.S. at 358 (“¶ 6(3)’s date – ‘the date on which the right asserted was initially  
 16 recognized by the Supreme Court’ – does not apply at all if the conditions in the  
 17 second clause – the right ‘has been newly recognized by the Supreme Court and  
 18 made retroactively applicable to cases on collateral review’ – have not been  
 19 satisfied”); see *Johnson*, 431 F.3d at 992 (applying *Dodd* under § 2244(d)(1)(C)).

### 20 III.

#### 21 ORDER TO SHOW CAUSE

22 IT IS THEREFORE ORDERED that, on or before **August 14, 2008**,  
 23 Petitioner shall show cause, if there be any, why this Court should not  
 24 recommend dismissal with prejudice of the petition based on expiration of the  
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27 <sup>3</sup> The Ninth Circuit recently held that *Cunningham* did not announce a new  
 28 rule. *Butler v. Curry*, Case No. 07-56204, 2008 U.S. App. LEXIS 12324, at \*32-  
 \*33 (9th Cir. June 9, 2008).

1 one-year statute of limitations. Petitioner's response must explain why his  
2 petition is not barred by the statute of limitations.

3 ***Petitioner is also advised that if he fails to timely respond to this***  
4 ***Order to Show Cause, the Magistrate Judge will recommend that the Court***  
5 ***dismiss the petition, with prejudice, based on expiration of the one-year***  
6 ***statute of limitations.***

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8  
9 DATED: July 14, 2008



ALICIA G. ROSENBERG  
United States Magistrate Judge